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Federation in Australia

The Commonwealth of Australia, as a Federation, came into existence on 1 January, 1901. It was made up of the six pre-existing British colonies, New South Wales, Tasmania, Western Australia, South Australia, Victoria and Queensland, to list them in the chronological order of their foundation. Situated as they were in a remote quarter of the globe, during the nineteenth century they were isolated from the mainstream of world events. As colonies, they retained a formal dependence upon the United Kingdom, although they contributed nothing to her budget and had complete freedom in regard to their internal affairs. But they were not independent nations. They had no international sovereignty. They could not conduct their own foreign policy, declare war or make peace; when the mother country was at war, they were at war too. They depended entirely on the United Kingdom for their defence, though because of their isolated position they were not greatly worried by fear of attack. Their skeleton forces were maintained almost entirely to deal with any threat of local disorders, and as an incidental result of this, their expenditure on defence was low.

Even between themselves, contacts were relatively slight. The Australian continent is large — its area is greater than that of the United States of America. The colonial capital cities, scattered around the coast, were not linked by rail until after 1883 (1917 in the case of Western Australia); interstate trade, though increasing, was limited by distance and by the continuation of largely self-sufficient local economies; even social contacts were relatively slight. As a result, each colony maintained a sense of independence, and was, in minor ways, jealous of its neighbours. True, more than ninety per cent of their population came from the United Kingdom, and nearly all had a common feeling of regard for their former homeland and of loyalty to it and the long-reigning Queen Victoria. They had a common political tradition, involving a belief in democratic government through elected parliaments, with freedom of speech and of the press, freedom of association, whether

political or economic, and equality before the law. They had a common language — English. They had a common belief in the Christian religion (though certainly divided between Roman Catholics and Protestants). They had a common economic outlook, believing in the rights of private property, the right of the individual to economic freedom, and in the ability of the capitalist system to develop their country, to keep them employed and to provide them with adequate incomes.

In these circumstances, while for a century after the first British settlement in the country in 1788 there was little demand for any form of union, because of the essentially small amount of intercourse between the colonies, there were no major obstacles to it either — no disputes over race, religion, nationality or ideology. Even economic rivalry was muted. In 1847, Earl Grey, then the British Secretary of State for the Colonies, had proposed a form of federal union, arguing that

> The principle of local self-government . . . must when reduced to practice be qualified by many other principles which must operate simultaneously with it . . . It is necessary that while providing for the local management of local interests, we should not omit to provide for a central management of all such interests as are not local . . . and there are questions which, though local . . . in respect to the British Empire . . . are not merely local in respect to any one [colony]. Some method will have to be devised for enabling the various . . . Australian colonies to co-operate with each other . . . for regulating the interests common to [them] collectively.

His proposals were then premature, but when towards the end of the century, personal and economic intercolonial contacts increased, the inconvenience of separate laws regarding similar activities — company law, postal services, quarantine, banking, coinage, bankruptcy, naturalisation, marriage and divorce, for example — began to be felt, and above all, inconvenience was felt in the area of trade. Customs barriers on the inter-colonial boundaries were becoming a nuisance. Demands for "interstate free trade" and the abolition of border customs houses become louder. A serious movement for a federal union came into existence.

In the 1890's a serious economic depression, with heavy unemployment, numerous bankruptcies and widespread bank failures affected this feeling in two ways. Momentarily, attention was diverted to the solution of pressing economic problems, and after a Conference on the question of federation in 1891, the subject lapsed for five or six years; but at the same time the economic crisis had stressed the need for common action to deal with a number of economic and social problems. Bitter industrial strife underlined the difficulties involved in dealing with disputes between employers and employees which were continent-

-wide and whose symptoms and effects went beyond the jurisdiction of any one government. The series of bankruptcies, particularly among the banks, stressed the urgency for inter-colonial action to maintain financial stability. A federal union might help to provide these things. And just as economic factors were becoming important, so were questions of defence and foreign policy. The colonies had no independent power in these matters, but had to bring pressure on Great Britain if they wished any particular policy to be adopted. When this had to be done, it was argued that a loud single voice would be more likely to be heard than six whispers. In 1883 - 84 the colonies had been worried about the activities of Germany in New Guinea and of France in New Caledonia and the New Hebridies; there followed years when the colonies expressed anxiety about excessive immigration from China, and later, possible aggression from Japan — at times referred to, following the words of the German Kaiser, as the "Yelow Peril". The need to co-operate in naval and military matters became a talking point — a far cry from the days when colonial defence was thought of as involving little more than building forts in colonial harbours to repel an enemy raider. Now an Australian navy and an Australian army were being mooted.

It is necessary to remember these factors because, in so far as they affected the movement for a federation of the Australian colonies, they affected the nature of the federal constitution which was eventually drawn up. The Federation was seen as an *aid* to its members — the separate colonies, in future to be called States — but at the same time, they wished to preserve their separate identity; hence except where powers were expressly transferred to the new federal authority, the States would retain their full legal rights and authority. The federation would be pluralistic. There would be a multiple government in a single geographical area, in so far as the States would retain considerable independence. This would be guaranteed by the constitution, and States' rights would be protected by law. The Australian federation was certainly centripetal, not centrifugal, but the States remained as important self-governing units, with substantial powers, and under the constitution these could not be reduced by central legislation, as is the position of subordinate local authorities in a unitary state, any more than they could be *compelled* to do something or other by the central authority. The federation guaranteed single, *united*, action on specifically defined matters, but these cannot easily be changed. This was a middle ground between a complete centralisation of power, or "unitarism", and the previously existing complete separation, or particularism, and while it is true there have occasionally been demands for more unity in Australia, more frequent has been the appearance on the political horizon of particular or separatist ideas protesting against alleged mis use of federal powers.

Such protests are not derived from the desires of religious, national, or other minorities to protect themselves against the domination of a ruling group, but have been based partly on a continued interest in and desire for some degree of local autonomy, and a feeling that State governments are more susceptible to the demands or wishes of local communities than distant and apparently impersonal authorities in a far off federal capital, and partly on a short-term political opposition to some policy at a particular moment being advocated by the Commonwealth government; but as has been noticed, inter-state differences are no more striking than inter-state likenesses, and the common traditions of all the Australian people have led gradually to a strengthening of an Australia-wide nationalism, which has produced an increasing sympathy for the central government and an acquiescence in an increase in its powers. For the new Commonwealth constitution gave to a number of formerly separate British colonies a form of union, with an instrument of government, which together made them more than a mere congeries of States; in fact, it has been said that it was "the birth certificate of a nation", a nation which developed during the twentieth century as the population increased, the economy grew stronger and British claims to interfere in its affairs slowly declined until formally removed by the Statute of Westminster, which, enacted in 1933, was adopted by Australia a decade later. Though the constitution did not abolish the established political institutions of any of the States, it reduced their powers; it facilitated the growth of central authority and of nationhood and in many ways contributed to the weakening of local feeling.

The constitution drew many of its features from that of the U.S.A. The Federal Parliament was to consist of two houses, a Senate, with an equal number of members from each State, and a House of Representatives, whose members were to be elected on the basis of population. The former has been said to represent essentially the "Federal principle", and the Senate derives its powers from the states, as separate societies, represented equally. It was to be the "outward and visible sign of recognition of State rights", which it was thought it would be the duty of the Senate to protect, although because their equal representation conflicted with the democratic idea that all electors should be equal, the powers of the Senate were slightly restricted, especially in financial matters. The House of Representatives on the other hand has been said to represent both the "national" and the democratic principle, representing the "people of the Commonwealth" as distinguished from "the people of the States".

Contrary to the experience of the U.S.A., it is this house that has become the more powerful and important. This is partly because of its

greater financial powers, but more importantly because ministers are responsible to the House of Representatives, and their continuance in office depends on their having the support of a majority of its members. At the same time, the Senate soon ceased to take any interest in protecting the rights of the States, for senators quickly came to regard themselves as members of a political party, and to speak and vote according to party policy, irrespective of the State from which they came, or the effect of any particular measure on that State. Consequently, over the years the rights of the States, if they were to be protected at all, have had to be protected in other ways. These, which will be discussed later in this paper, have not always been effective, but basically they rest on the division of powers prescribed by the constitution, and the interpretation of these powers by the High Court of Australia. (On a few occasions in the past the judicial committee of the Privy Council of the United Kingdom has determined constitutional cases, although it was always necessary to obtain the permission of the High Court to appeal to the Council against the Court's decisions on matters concerning state and federal powers, and in 1968, even the limited right of appeal was abolished). There have been many proposals to vary the limitations on federal powers by amending the constitution, but generally speaking these proposed amendments have been rejected when voted on at the referendum which is necessary to enact them.

The most important section of the constitution dealing with the division of powers is Section 51, which lists those subjects "with respect to" which the Commonwealth might make laws. On matters outside this list, the Commonwealth may *not* legislate, so, as was noted above, it has been a matter of much importance how the Court has interpreted these subjects, as set out in the constitution, and whether its interpretations can in some way or another be evaded. Interpretation of a statute, as every lawyer knows, is frequently not easy; interpretation of a constitution is even more difficult, and as a leading Australian constitutional lawyer has written, of both the Australian High Court and the Supreme Court of the United States,

> "experience has shown that a court interpreting a complex and often obscurely worded constitutional document becomes of necessity a kind of legislator. The Australian politician has to consider, not only the possible view of the electorate, of the state parliaments and of the Federal parliament. He has also to consider the possible view of the High Court on a proposed measure, and this last view might be the most difficult of all to predict" [1].

It has been said of the United States Supreme Court that it tends

[1] G. Sawer, *Australian Government Today* (1977), p. 11.

to follow the election returns. Whether or not this is true, it is certain that it has followed different "fashions" in constitutional interpretation, and the Australian High Court has done the same. The latter Court at first followed doctrines which have been described as embracing "implied immunities and implied prohibitions", by which is meant that it tried to balance State and federal powers by preventing either State or federal governments interfering in matters which were "implicitly" reserved to the other, even though not "explicitly" so reserved. The most famous example of this was given when the Commonwealth attempted to impose an excise duty on certain manufactured goods, a duty which would not be payable if the men employed in their manufacture were paid a certain minimum wage. It was agreed that the Commonwealth could legislate to impose excise duties under its taxation power, but the Court held that the act imposing the duty in this case was not really one "in respect to" taxation, but one intended to regulate industry, a subject "in respect to" which the Commonwealth could not legislate; hence the Court declared the act unconstitutional and therefore invalid, on the ground that the Commonwealth could not do indirectly what it could not directly [2].

These doctrines aroused opposition from both politicians and lawyers, and eventually they were overruled in a famous, decision in 1920 in the *Engineers' Case* when the Court held that federal powers were not limited in this way by any implications, and that they must be interpreted as laid down in the constitution without consideration of what might or might not be implied [3]. Thus the decision rejected the presumptions made by the first judges of the High Court. It made it clear that the constitution should not be regarded primarily as a contract embodying a supposedly definite system of principles, known as Federal, with an implication that the States and the Commonwealth must not interfere with each other's governmental activities, and a presumption that a narrow construction of Commonwealth powers was necessary to prevent it trenching on those of the States. It brought a new approach to constitutional interpretation, which gave a broad scope to Commonwealth powers, and did not restrict them by any preconceived ideas about what must be permitted to the States. It was now held that so long as the Commonwealth was exercising a defined power, its laws would bind the States, and that the Commonwealth could make any State law inoperative by over-riding it by Commonwealth legislation whenever on ordinary reading of the powers given to the Commonwealth by the constitution permitted this.

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[2] *The Commonwealth v. Barger*, 6 Commonwealth Law Reports (CLR), p. 41.

[3] *Amalgamated Society of Engineers v. the Adelaide Steamship Company* (1920), 28 CLR, p. 129.

Mr. Justice Isaacs, who read the decision, was a firm believer in Australian nationalism and in democracy. He objected to judges trying, by making "implications", to obstruct democratic processes by overruling what a popularly elected Parliament saw fit to do, so long as the Parliament kept within the letter of the law, and after a long period when he had been in a minority on the Bench, at last he found his views accepted by the majority. In a sense this reflected a political attitude, but as was later admitted by Mr. Justice Dixon,

> The constitution is a political instrument.
> It deals with governmental powers. It is not
> a question whether the considerations are political,
> for nearly every question arising from the
> Constitution can be so described [4] —

and changing political attitudes would almost inevitably lead to changing interpretations of the constitution. Alfred Deakin, a prominent Australian politician and one of the leaders of the Federal movement, who was three times Prime Minister later on, noticed this in 1902 when he was introducing the bill which was to establish the High Court. Commenting on its probable effects and advantages, he pointed out that any formal amendment of the constitution would be

> a comparatively costly and difficult task, and one
> which will be attempted only in grave emergencies . . .
> But the nation lives, grows and expands. Its
> circumstances change, its needs alter, and its problems
> present themselves with new faces . . . It is as one of
> the organs of Government which enables the Constitution
> to grow and be adapted to the changeful necessities
> and circumstances of generation to generation that the
> High Court operates . . . [moving] by gradual, often indirect,
> cautious and well considered steps that enable the past
> to join the future, without undue collision and strife
> in the present [5].

This is what the High Court has often done — though the decision in the *Engineers' Case* involved a more radical change in interpretation than is usual. Though some commentators have argued that this was necessary to correct past errors, others have regarded it only as a demonstration that the capacity of the Common Law to grow and develop as needs change can govern constitutional law as well. According to this view, by 1920 Australians were thinking of themselves as belonging to, and being citizens of, the Commonwealth rather than any of the

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[4] In *Melbourne v. the Commonwealth* (State Banking Case), 74 CLR, p. 31.

[5] Commonwealth Parliamentary Debates, vol. 8, p. 10967, quoted, J. A. La Nauze, *Alfred Deakin* (1965), p. 291.

States, and the interpretation of the public law was responding to public sentiment. As Mr. Justice Windeyer put it in 1971 [6]:

> In 1920 the constitution was read in a new light, a light reflected from events that had, over twenty years, led to a growing realisation that Australians were now one people and Australia one country. . . . The *Engineers' Cace* . . . was a consequence of developments that had occurred outside the law courts. . . . [and] in any country where the spirit of the common law holds sway, the enunciation by courts of constitutional principles based on the interpretation of a written constitution may vary and develop in response to changing circumstances.

Whether this be so or not, this interpretation led to an increase in what seemed to be constitutionally permissible to the Commonwealth, and although after 1942 the Court appeared to return a little to the earlier practice of limiting federal power, this was the result not so much of a consideration of the possible implications of the constitution as of a stricter interpretation of what was actually stated. It remained true that express powers and express prohibitions were what was relevant, not what might be thought to be implied, and it was not thought to be the proper function of the Court to devise restrictions not stated in the constitution in order to check any abuse of power. Since 1965 there have been some signs of another reversal of approach, involving a return to the second-period interpretation (i.e. that between 1920 and about 1942), but the best summary of current interpretation may perhaps be read in the following extract from a judgement by Chief Justice Barwick in a case in which the Court over-ruled a long-standing decision on the power of the Commonwealth to legislate on companies, and encouraged the idea that many commercial activites could be brought under Commonwealth jurisdiction. "The subject-matter granted to the Commonwealth", he said, "will be determined by construing the words of the Constitution . . . irrespective of what effect the construction may have upon the residue of power which the States may enjoy" [7].

Though the result of any particular "construing" cannot always be predicted with confidence, the enactment of the *Trade Practices Act* of 1966 presaged an attempt to widen the scope of Commonwealth legislation by using the power to make laws with respect to corporations previously hamstrung by the decision in 1908 which was strongly influenced by the doctrine of implied prohibitions, and the upholding of

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[6] Windeyer, J., in *Victoria v. the Commonwealth* (1971), quoted in W. J. V. Windeyer, *Some Aspects of Australian Constitutional Law* (1973), p. 37.

[7] *Strickland v. Rocla Concrete Pipes Ltd* (1971), 124 CLR, p. 168, over-ruling *Huddart Parker v. Moorehead* (1908), 8 CLR, p. 330.

this act suggests that the Court has taken what has been called "a more adventurous approach", exhibiting a "willingness to look at enduring changes in the structure of Australian society". But at the same time, it always has "to accept the basic principle that there is a distribution of functions between Commonwealth and States, and that there must be some limit to the competence of the Commonwealth", for those who drew up such an elaborate constitution would hardly have done so if "the interpretation of its provisions or any one of them would have made the whole exercise a waste of time [8]". Over the years the Court has certainly struck down many attempts by the Commonwealth government to legislate on some subject or another, because of a constitutional lack of power, but on balance it seems that it has tended in its interpretations to expand the constitutional limits within which the Commonwealth may act. In so doing, it has backed up the economic and political factors which have influenced the government to move in the same direction, but it must be admitted that such an opinion rests on a speculation about what limits the Court might have imposed had it always followed stricter lines of interpretation rather than paying too much attention to the cases in which a more liberal attitude might have been taken to the definition of the powers of the Commonwealth [9].

Several of these are worthy of comment. The power to control defence has been interpreted in wartime to cover almost every aspect of national life, from conscription to fixing prices and imposing "daylight saving". During the war it enabled the government to ban political parties, though it should be noted that this was held to be unconstitutional in peace time. The power to conduct external relations permits the Commonwealth government to pass legislation necessary to implement an international agreement, even though its subject matter is one which would not otherwise be within its competence, as is often the case with agreements made in connection with the International Labour Organisation. The power to make laws with respect to postal and telegraphic services was interpreted to include radio, and later television, and by establishing the Australian Broadcasting Commission under this clause, the Commonwealth government has become, through the Commission and its artists, the greatest musical entrepreneur in Australia, something hardly foreseen by its founders — just as it has appropriated money for industrial and scientific research, literature and the arts.

The Commonwealth has no direct power with respect to industry or labour, but it is able to regulate them indirectly, either, as has been mentioned, under the external affairs power, by signing international agreements which relate to these matters, or by regulating industrial affairs which relate to interstate and overseas commerce, as the Con-

[8] G. Sawer, *Australian Federalism in the Courts* (1967) p. 205.

[9] Ibidem, p. 88.

gress of the United States has done — and in this respect it has acted with regard to seamen, stevedoring and aviation, for example — or by acting with regard to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state". This provision concerns a subject which is peculiar to the Australian constitution, and was only included in it after prolonged discussion; however, though it was originally intended to deal primarily with nomadic workers, like shearers or seamen, it has provided the basis for a wide-ranging code of wage fixation and industrial law. Thus though the Commonwealth cannot directly regulate wages or working conditions, as the States can, it can establish a system of conciliation and arbitration whose officers may determine such matters for all parties to any industrial dispute. The limitations are that the dispute must occur in an "industry" (this raises the question, what is an industry? — but the Court's jurisdiction covers clerks, journalists and banking officers) and it must extend beyond one State; but provided the dispute in question is one with which the Commonwealth authorities may deal, their decisions (or awards) rank as Commonwealth law (and as such over-ride any State legislation). This means that the Commonwealth arbitration court, established under this power, may decide on conditions of apprenticeship in some industry, and so nullify, for that industry, any State apprenticeship act. And so with regard to wages. Long ago, Mr. Justice Higgins, for years the distinguished President of the Arbitration Court, held that the power to fix wages was an essential part of an arbitrator's work, and since then, the Court has fixed wages for all workers whose disputes have been brought before it. This has meant incidentally that no Australian parliament can legislate to fix wages in an area where the Commonwealth Arbitration Court has jurisdiction and has made an award — areas which are now extremely widespread — for the Commonwealth has no power to do so, and the States, as has been noticed, may not over-ride an award. Awards are binding on the parties, and can require a party to apply it to persons who were not originally parties to the dispute which the award settled. Governments may, and often do, intervene in cases to put their point of view with regard to the proper conditions for the settlement of any dispute; but they cannot over-ride the decision of the arbitrator. On several occasions, Commonwealth governments have tried to amend the constitution to give them direct control over industry, including control over wages, but the referenda proposing these changes have always been rejected. In 1929 the Commonwealth government proposed to withdraw from the arbitration field, except with regard to shipping, but this proposal also was rejected — and so long as the Commonwealth Arbitration Court exists, there will remain this curious arrangement whereby the determination of vital matters about the conduct of indu-

stry must be made, not by elected parliaments, but by officials (arbitration court judges and conciliation commissioners) nominated for life and respossible to no one.

The Commonwealth government also has power to control interstate trade and commerce, and in this respect Australia was following the example of the U.S.A., whose constitution (sec. 8) empowered Congress to "regulate commerce with foreign Nations and among the several States". In both countries, a distinction was drawn between inter-State and intra-State trade and commerce, the latter being left under the control of the States, though in practice such a distinction has not always been easy to maintain. In the United States, this power has enabled the Federal government to widen its powers considerably in relation to the States, for although the principal object of this section was to prevent trade discrimination (or interstate protection) between the States, it has been used to regulate trusts, railways and shipping and the charges they levy, the production, transmission and sales of electric power used in interstate commerce, the labour conditions of those employed in interstate commerce and labour relations which affect it. There were occasional set-backs arising from adverse court decisions (e.g. regarding child-labour), but since the Court declared in 1937, for example, that industrial strife has "a most serious effect upon interstate commerce", the power to regulate this commerce can be used to justify a great deal of federal legislation on subjects which do not at first sight appear to be included in the powers of Congress; indeed it has been argued that the result of Supreme Court decisions has been "to leave the concept of intra-state trade almost empty" (and this is the province of the States), though to a large extent this has been "merely the inevitable consequence of national economic integration" [10].

In Australia, this power has not been used so much. One of the reasons is that the constitution provided the Commonwealth government with other methods of extending its powers, which are more extensive than those in the U.S.A.; the other is the existence of what might be called the "notorious section 92". This, the most constantly litigated provision of the constitution, declares forthrightly, and it was hoped unambiguously, that "trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free", but these words have always been difficult to interpret, and indeed a man, who was for nearly forty years either secretary of the Attorney-General's department or Solicitor-General, wrote after his retirement that the law student, after considering the various meanings which the Courts had attached to it, would "close his note-books and his law books, and resolve to take up some easy study, like nuclear

[10] G. Sawer, *Australian Federalism in the Courts*, p. 206.

physics" [11]. This clause reflects the most important force which led to federation in Australia — the desire for complete interstate free trade. There was to be no obstacle to this, no duties whatever, protective or non-protective, which might be imposed on trade between the "semi--independent" States of the federation — and the authors of the constitution were ready to ignore such apparent trivialities as the need for freight charges, wharfage and harbour dues, the licensing of hawkers and traders, and possible health or quarantine regulations (though reservations were made about "inspection laws" and alcohol and drugs). But the desire to get rid of customs houses on the State borders over--rode all warnings that "absolutely free" was a very wide phrase, and indeed that the subsequent interpretation of it might conflict with the section giving the Commonwealth power to make laws with respect to trade between the States — for how could one make laws about something required to be "absolutely free"? This dilemma seemed to be solved by a decision in 1920 that the clause bound only the States and not the Commonwealth, but in 1936, this was reversed, with the result that while it was agreed that Commonwealth legislation could not restrict "absolute" freedom of interstate trade, it could regulate something, the precise extent of which was somewhat uncertain [12].

The clause certainly helped to maintain the economic unity of the Australian market, but it has prevented the carrying out of various economic policies and activites, and since the electorate has repeatedly refused to agree to amend it and the High Court's endeavours to make sense of it have not removed the confusion and uncertainty which surround it, it may also be argued that it has obstructed economic development. It has been used to prohibit the nationalisation of the air--lines and the banks, to restrict the regulation of interstate road traffic, and to prevent the operation of organised marketing schemes which depend on the compulsory acquisition of any commodities that may be destined for interstate trade, for all these things would interfere with the absolute freedom referred to. In 1949 it was held that

> Section 92 is violated only when a legislative or executive act operates to restrict such trade commerce or intercourse *directly* and *immediately* as distinct from creating some *indirect* or *consequential* impediment which may fairly be regarded as remote; [Author's italics]

but such a definition is uncertain, and as was admitted at the time, "in determining whether an enactment is regulatory or something more, or whether a restriction is direct or only remote or incidental, there cannot fail to be differences of opinion". The general "conception" of

[11] R. R. Garren, *Prosper the Commonwealth* (1958), p. 415.

[12] *McArthur's Case* (1920) 28 CLR, p. 530; *James v. the Commonwealth* (1936) 55 CLR, p. 1.

free trade is capable of many different applications, and it is for the court to decide which of these are legal. "Every case must be judged on its own facts and in its own setting of time and circumstances"; it could even be that in some circumstances "prohibition with a view to State monopoly was the only practical and reasonable manner of regulation, and that interstate trade, commerce and intercourse thus prohibited and thus monopolised remained absolutely free" [13].

This section has perhaps more than any other restricted the powers of the Commonwealth government, and as it also binds the States it has in fact left a legislative vacuum in an area where the constitution specifically forbids certain action by a n y government, State or federal (as do the Bill of Rights amendments of the United States constitution [amendments 1 to 10] and the fourteenth amendment). But apart from this limitation, the Commonwealth government has greatly increased its strength by the application of its financial powers — the power to tax, the power to make grants, the power to give federal taxes priority over State taxes, and the prohibition on State customs and excise duties (and on sales taxes, receipt duties and some licence fees, which have been interpreted as coming under this prohibition) — and these have led to an enormous development of the power of the federal government, enabling it to "influence" many of the activities of the States, and at times even to compel them to adopt policies prescribed by the Commonwealth.

This development was forecast, by Deakin again, as early as 1902, when he commented that

> "when two men ride on horse-back, one rides behind . . . The Federal Parliament . . . will not consent to finance the local treasuries except for value received. If it provides money for the States it will exact tribute from them in some shape. As the power of the purse in Great Britain established by degrees the authority of the House of Commons, so it will in Australia ultimately establish the authority of the Commonwealth. The rights of self-government of the States have been fondly supposed to be safeguarded by the Constitution. It has left them legally free but financially bound to the chariot wheels of the Commonwealth. Their need will be its opportunity. . . . Every extension of political power will . . . go to increase its relative superiority" [14].

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[13] *Commonwealth v. the Bank of New South Wales* (1949), 79 CLR, pp. 487 and 641.

[14] Deakin to the *Morning Post*, 12 May 1902, in J. A. L a N a u z e (ed.), *Federated Australia* (selections from Deakin's letters to the *Morning Post*) (1968), p. 97.

Certainly the experience of Australia has proved the truth of the dictum that "the problem of finance is the fundamental problem of federalism", and it cannot be said that Australia has solved that problem, save in the sense that the Commonwealth has acquired almost complete financial control over the States, though doubtless it may be inhibited a little by a fear of adverse political reactions.

Initially it seems as if the power of the Commonwealth to make grants to the States was intended to enable the former to help any of the latter whose finances were unduly upset by the transfer to the Commonwealth of the power to collect customs and excise duties, which in 1900 constituted the principal source of the States' revenue. After an initial period during which the Commonwealth was compelled, by the constitution, to pay three-quarters of its customs revenue to the States, it agreed, voluntarily, to make grants to them on a *per capita* basis. But this was a voluntary arrangement, and by threatening to withdraw these grants, the Commonwealth "persuaded" the States to sign a "Financial Agreement", which was then embodied in the constitution, by constitutional amendment. This provided first that the Commonwealth would make a contribution towards the interest payable on the States' debts; secondly, it assumed liability for these debts; thirdly, a Sinking Fund was to be established for them; fourthly, and most importantly, all future borrowings by State or Commonwealth government were to be controlled by a Loan Council, on which each State would have one vote, and the Commonwealth two, plus a casting vote, so that it, with two States could outvote the other four. This body of course limits the financial independence of all parties, but since the Commonwealth government directly controls the Commonwealth central reserve bank, and hence the loan market, it is usually in a position to enforce its wishes, whatever the voting at the Loan Council. Apart from this, however, given the power to manage all the debts, and to make laws to carry out the Financial Agreement, in 1932 the Commonwealth was able to "garnishee" New South Wales State revenue in order to compel that State to pay full interest (instead of a reduced rate) on it, thus demonstrating that under certain conditions it could seize the revenues of a State and paralyse its machinery of government [15]. Thus the States had aspects of their financial policy dictated by the Commonwealth.

This was an exceptional case, but far more important, because a normal feature of government, has been the power of the Commonwealth to grant financial assistance to the States "on such terms and conditions as the Parliament thinks fit". This section is unambiguous, and has been held to mean precisely what it says. The first clear decision on it was made by the High Court in 1926, when the Commonwealth

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[15] *New South Wales v. the Commonwealth, no. 1* (1932), 46 CLR, p. 155.

parliament passed an act providing financial assistance to the States for making roads. Though road-making is not a Commonwealth function, and the Commonwealth government could not make laws about it directly, the act defined the types of roads on which the money could be spent, thus directly interfering in road policy, and the Court held it valid. Objections from the smaller States, who were less concerned with road making than the larger ones, were of no legal effect, and the decision meant that the Commonwealth, by making conditional grants of money, might enter into virtually any field of action, whether or not it was one that had been transferred to it by the constitution.

Far more drastic were the effects of Uniform Taxation, imposed in 1942. To maximise its revenue for war-time financing, the Commonwealth imposed a very high rate of income tax, and gave priority in collection to that tax over any State income tax. To prevent the high Commonwealth tax, in conjunction with State income taxes, exceeding 100 per cent, it was necessary to stop the States levying income tax. To do so, it offered grants to the States, to compensate them for losing revenue, p r o v i d e d they did not levy income tax. Introduced as a wartime measure, uniform taxation has continued ever since, and the logic of the operation is that the States could eventually become primarily administrative agencies, carrying out policies that are determined by the Commonwealth. The major part (60 per cent) of the revenue of the States has since then been provided by the Commonwealth government, which has, as has been noticed, wider sources of revenue and priority in collection; on its grants it has the right to lay down conditions controlling the way they may be spent — and these may be as wide as the Commonwealth chooses to make them. They effectively limit State independence in two ways. First, the Commonwealth has followed up its essay into road-making with many other excursions into what was once thought to be forbidden territory. For example, it has taken over full control of every aspect of tertiary education, including the numbers and siting of universities, the salaries to be paid to and the conditions of work of their teaching staffs. It has moved into secondary education through its policy of making grants to so-called "independent" schools, that is those which exist outside the state-school system, being owned and managed by the Churches or other private organisations. Likewise it has moved to control hospitals, national and urban development, environmental protection and conservation — a development very noticeable under the Labour government which was in office between 1972 and 1975. Secondly, there are general constraints that the Commonwealth may impose simply by limiting the size of its general grants. In 1976, when the Commonwealth decided that public economy was necessary, it was in a position to compel State governments to follow suit in reducing their expenditure, limiting the number of their public

servants, and joining them in attempting to follow a "deflationary" economic policy. In 1942 the Chief Justice had remarked that the Commonwealth could pass legislation making grants to the States subject to "the satisfaction of the Commonwealth with the policies [. . .] of the states". In such an event "all State powers would be controlled by the Commonwealth — a result which would mean the end of the political independence of the States". This might be thought to be an abuse of power, but the remedy for this was "to be found in the political arena and not in the Courts" [16]. It is indeed the ballot box that ultimately safeguards the States — so long as the voters want them to be safeguarded — and certainly in practice the Commonwealth has at times refrained from coercing the States when some people might have thought it proper to do so.

It is time perhaps to consider what may be learned from this necessarily brief discussion of the working of the federal system in Australia. It was designed to meet the demands of the inhabitants of the six Australian colonies for nation-wide laws covering a number of topics of nation-wide concern, while at the same time leaving other matters under local control. This division was essentially based on convenience, and not on any need or desire to provide special safeguards to protect the rights of any local group, whether these were based on its having a religion, or national culture, or economic position, or any other special characteristic which distinguished it from the majority of Australians, but there was a general unwillingness to hand over too many powers to the new federal authority. However the essential impetus to establish some form of central (i.e. federal) authority came from the desire to strengthen the economy and to strengthen defence; it was helped by a common cultural heritage and common political ideals, and was nowhere impeded by divisive national or religious minorities. There was little obvious distinction in the federal or anti-federal feelings of different social groups, though at first the middle classes were probably more interested in the problem than were the working classes, and people living near the old intercolonial borders felt their inconvenience more than did those whose life they affected less directly. The federal movement thus constituted an important step towards the creation of an Australian nation, but the limitation placed on the sovereign powers of the separate colonies was the less severely felt because their sovereignty had never been complete, owing to their dependence on the United Kingdom, and the "founding fathers" thought they had safeguarded in the constitution the rights and powers which they regarded as essential to the welfare of their citizens.

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[16] Latham, C. J., in *South Australia v. the Commonwealth* (1942), 65 CLR, p. 429.

It is true that as time went on some of the States developed grievances. After prolonged dissatisfaction and criticism, Western Australians in a referendum in 1933 declared decisively in favour of secession (by 138,633 votes to 70,706) — but of course this unilateral expression of opinion had no practical effect. Curiously perhaps, though the constitution makes provision for the alteration of State boundaries, for the sub-division of States, and for the admission of new States, it makes no provision for a State to secede. A secession could only be carried out by a constitutional amendment, which would have to be agreed to by a majority of all voters throughout the Commonwealth (and in four separate States) or by the parliament of the United Kingdom amending the Commonwealth of Australia act. The latter is now legally impossible (except at the request of the Commonwealth parliament) and the former is virtually impossible in practice, so effectively no State can secede, and all must submit to a reduction in their sovereign powers co-relative to the extent of the powers of the Commonwealth. As was made clear by the war of 1861 - 65 in the United States, revolution is the only remedy available to a State which believes that its position is unendurable; it is, of course, the responsibility of political leaders to ensure that there are never adequate grounds for such a belief, or that if there are, that these can be removed by changes in policy. Clearly the likelihood of a breakdown depends on the people's willingness to accept court decisions, even when displeasing, and to prefer to stick to the rules of the system and to preserve law and order rather than to embark on any violent preceedings, and in Australia such a preference appears to be strong.

At present the Australian electorate does not seem very interested in the complexities of constitutional law and practice. Its criticisms are directed at government policies, which can easily be changed, either by elections, or by the threats of the electoral effects of a hostile public opinion, rather than at the constitution, which is relatively inalterable. Although, in theory, in Australia, one political party (the Labor party) favours centralisation, and its principal opponent (the Liberal party) is more sympathetic to the rights of the States, in practice, when in office both parties behave very similarly. The present Liberal government, which has held power since December 1975, has been extremely firm in its control of the basic economic and financial policy of the country. It has kept up the centralised interference in health policy which its Labor predecessor had increased. It has asked the States to hand over to it powers to control labour relations in all circumstances throughout the country (though it is certain that this request will be refused). It is probably true that in the contemporary world it is essential that a nation should have some single authority which can in the last analysis determine and carry out economic policy in times of peace, and military operations, with their manifold ramifications, in time of war. To this extent,

an increase in centralised power seems inevitable, whether it be achieved by a centralising interpretation of the constitution in the High Court or by a more ruthless exercise of the financial powers of the Commonwealth — or both. The opposing demands for decentralisation are, in Australia, much weaker, though the State governments' apparatus — legislature and public service — provides a strong vested interest in the perpetuation of a federal system which leaves considerable powers to the States. As has been noted, there are few special local interests which need protection — and for that matter, if there were, as has also been noted, the constitution would not be very effective in protecting them. Real local (grass-roots) administration may at times be desirable, and this can be achieved by administrative delegation, but true local government in Australia is very weak. State governments have always been, within their own boundaries, centralising agents, and a bureaucratic administration looks the same to many people, whether the bureaucrat takes his orders from a State or the federal capital.

There have certainly been examples of voluntary federal-state co-operation, carried our through a variety of *ad hoc* institutions. The most important of these is the Premiers' Conference, now held in Canberra at least once a year, and frequently more often. Initially the State Premiers dominated the Conference, but as the power of the Commonwealth has increased, the Commonwealth Prime Minister has come to play a leading (at times even a dictatorial) role. During the Great Depression, it was a Premiers' Conference that drew up and agreed to the "Premiers' Plan", which prescribed a common financial policy for dealing with it. It enhanced its prestige (and Commonwealth influence in it) during World War II, when its decisions played an important part in the mobilisation of the country's resources. Since the war, and the imposition of uniform taxation, its agenda has been dominated by financial affairs, and here, as has been noticed, the Commonwealth's role has steadily increased. Although the government led by Mr. Fraser, the present Prime Minister, promised in 1975 to reverse some of the centralising tendencies of the previous Labor administration, led by Mr. Whitlam, and it did reduce some of the Commonwealth's conditional grants to the States, it did not go very far — though this is partly the fault of the States. The federal government agreed to pay to the States a specified proportion of the income tax it imposed, but on the assumption that this might not be enough, proposed to allow the States to "surcharge", within limits, the federal rate of tax. This would allow the States to determine their revenue, again within limits, but no State has as yet been willing to do this. In fact, during the past thirty years, the States have been more inclined to abandon or reduce taxes which they have the responsibility of raising — such as entertainment tax (repealed), land tax (reduced), and death and gift duties (in process of being abolish-

ed). In other words, State politicians have preferred to blame the Commonwealth government for their financial difficulties than to take independent steps to overcome them, and so long as they prefer to do this, it is not surprising that they see their independence reduced by Commonwealth control.

Other federal-state conferences have been held on a variety of matters, attended by a variety of persons, with a variety of results. There have been agreements reached and implemented on subjects like immigration, the use of the waters of the River Murray, the disposal of sugar, the taxing of flour, and the mining of coal. Attorney-Generals have tried to draw up proposals for uniform legislation on different topics, such as company acts, restrictive trade practices, child adoption, hire purchase and so on. Ministers of Health have been concerned with pure foods and poison control; other ministers with the protection of consumers and the environment.

Other discussions have concerned inter-state police co-operation, off-shore "rights" with regard to oil drilling and other mining, agriculture, transport and so on. Since all these owe their initiation to politicians and administrators, this means that their regular activity is not subject to popular review or parliamentary control, except when legislation is necessary; however, as has been said, this co-operation helps to adapt a nineteenth century style of federalism to the needs of the twentieth century, "without going over to a completely centralised or unitary constitution" [17]. Though formal unification is as far away as ever, and though the States keep reasserting an important role, there is no doubt that "the dynamic of Australian federalism continues to strengthen federal power" [18], and this tendency is all the stronger because of the absence of any real reason — nationalist, cultural, religious or anything else — for local autonomy, as there are in so many other federations in the world today.

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[17] G. Sawer, *Australian Government Today*, pp. 31.

[18] Ibidem, p. 24.